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No. 441

IN THE SUPREME COURT OF THE UNITED STATES

GENE DOWNING,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

GENE DOWNING, Petitioner,
By his Attorney,
H. G. BILL DICKEY,
The Law Building,
500 West 7th Street,
Tulsa, Oklahoma.

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 1965

GENE DOWNING,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, GENE DOWNING, a resident of the State of Oklahoma, was convicted on May 7, 1964, in the United States District Court for the Western District of Texas, El Paso Division, on all ten counts of an indictment returned in that jurisdiction.

The defendant was charged on nine consecutive counts of violating Title 18, U. S. C. 2314, each of the nine counts charging unlawful transportation of a forged security from El Paso, Texas, to San Francisco, California.

The tenth count charged the defendant with violation of Title 18 U. S. C. 371, or in substance, a conspiracy alleged to have occurred in the State of Oklahoma.

The defendant was sentenced to a term of five years imprisonment. This judgment and sentence was appealed to the Court of Appeals for the Fifth Circuit, and upon July 12, 1965, the said Court of Appeals affirmed said judgment and sentence.

The Petitioner herein asks the Supreme Court of the United States to review the judgment and sentence in this cause for the reason that an issue is contained in this case upon which the Petitioner states, has never been decided by this honorable court.

Specifically, the Petitioner seeks this Writ of Certiorari for a determination of the effect and the applicability of Federal Court Rule No. 43, which reads as follows:

> "The defendant shall be present at the arraignment at every stage of the trial, including the impaneling of the jury and the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence, shall not prevent the continuing of the trial to and including the returning of the verdict. A Corporation may appear by counsel for all purposes. In prosecution for offenses punishable by fine or imprisonment, for not more than one year, or both, the Court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence. The defendant's presence is not required at the reduction of sentence under Rule 35."

During the deliberation of the jury in this cause, there was communication upon at least three occasions

with the jury by the Court and bailiff without the knowledge or presence of either this defendant, nor his counsel. On Pages 321, 322 and 323 of the record it was made to appear clear that without the presence of either the defendant, nor his counsel, the jury was recessed for lunch and reconvened by the Court after lunch and the circumstances surrounding these two contacts with the jury were unknown to the defendant and his counsel, even though they were readily available outside the court room door.

The record further shows on the above named pages that the jury had sought the exhibits in the case, and apparently the exhibits were taken to the jurors who were deliberating on another floor of the said court house. Counsel, nor the defendant, were given an opportunity to examine, or to see exactly what instruments, whether exhibits or not, were furnished to this jury while deliberating his fate. Petitioner believes that the purpose of Rule 43 and the construction thereof is so clear that there can be no other interpretation of the rule, except that Congress meant exactly what it said when the law was enacted as the presence of the defendant "at every stage of the trial, including the impaneling of the jury and the return of the verdict . . .", certainly it anticipates that the deliberation of the jury is the most important part of the proceedings and that failure of the court to permit the defendant and his counsel to be present when any communications with the jury were had, constitutes reversable error that can not be waived.

Certainly, in this case there was no waiver of any rights, but the court arbitrarily handled the jury as it

saw fit during its deliberation. This is particularly true in this case that the rights of the defendant should have been preserved for the entire record discloses that the defendant had never been in the State of Texas nor to California during the times alleged in the indictment, nor did he communicate with any person in the areas charged in the indictment.

It is particularly true that this was known to the prosecuting officials in Texas. In addition to this, the defendant was refused a motion for a bill of particulars, and was refused a list of witnesses on Page 31 of the record, wherein both of these motions were renewed by defendant's counsel immediately before trial.

THEREFORE, this defendant, a resident of the State of Oklahoma, was put to trial in a jurisdiction where he had never been, and charged with a ten count indictment, and at the time the jury was impaneled, he did not know what witnesses would testify against him, which made it impossible for him to defend himself.

THEREAFTER, as set forth above, the court chose to communicate with and handled the jury arbitrarily and we believe same to be directly contrary to Federal Court Rule 43, *supra,* and that by reason thereof, that the defendant's rights were violated and made it impossible to insure fairness of his trial and particularly the fairness of the deliberations of the jury. It is important to note that even though these communications were had by the trial court with the jury that the record was completely silent as to these communications until the record was

perfected by defendant's counsel. There is no way for anyone to know exactly what was said and done in the presence of the jury, because the same was not reported by court reporters, and any attempt to reconstruct this matter would be purely guess-work on the part of anyone, and we believe that Federal Court Rule 43 requires more than this for the preservation of a defendant's rights.

WHEREFORE, the defendant, GENE DOWNING, respectfully requests that this honorable court grant and issue its Writ of Certiorari, ordering the entire record transmitted to said court for its determination.

GENE DOWNING, Petitioner,
By his Attorney.
H. G. BILL DICKEY,
The Law Building,
500 West 7th Street,
Tulsa, Oklahoma.

CERTIFICATE OF SERVICE

I, H. G. BILL DICKEY, certify that I, on this 9th day of August, 1965, did place a copy of the above and foregoing instrument, being a true and correct copy, in the United States mail, addressed to United States Attorney, Western District of Texas, El Paso Division, Federal Courts Building, El Paso, Texas, and, an exact copy mailed to the Clerk of the Court of Appeals, Fifth Circuit, Room 408, 400 Royal Street, New Orleans, Louisiana, with air mail postage thereon being fully prepaid.

H. G. Bill Dickey

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 441

GENE DOWNING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. II, 346) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1965. The petition for a writ of certiorari was filed on August 10, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied the right to be present at his trial, when the jury was sent to lunch and given exhibits prior to being brought back into the courtroom.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Western District of Texas on all counts of a ten count indictment charging transportation of forged Bank of America travelers checks in violation of 18 U.S.C. 2314 and conspiracy to commit such offenses (R. I, 1-8; R. II, 325).[1] He was sentenced to five years on each count, to run concurrently (R. II, 321, 331-335). The court of appeals affirmed the conviction (R. II, 346).

1. The evidence showed that blank travelers checks of the Bank of America were stolen in the burglary of the First National Bank of Nash, Oklahoma on February 23, 1962 (R. I, 78-86). The stolen checks later appeared under the back seat of an automobile at petitioner's home in Tulsa, Oklahoma (R. I, 90, 113-116, 118-119). On March 2, 1962, co-defendants Trusty and Pickard agreed with petitioner that they would forge and negotiate the checks, subtract expenses from the proceeds and split the balance equally

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[1] Petitioner had been indicted with Burns Trusty, Jr. and Robert Pickard (R. I, 1-8). He was tried separately (R. I, 32). Co-defendants Trusty and Pickard both entered pleas of guilty to the tenth count and were sentenced to imprisonment for five years and three years respectively.

among the three of them (R. I, 90-91, 106-108). Pursuant to this agreement the two men cashed a number of checks in various States and shared the proceeds with petitioner when they returned to Tulsa on March 9 (R. I, 91-103). About $3,400 worth of blank checks remained and were returned to petitioner (R. I, 103). On about March 12, 1962, petitioner instructed Trusty and Pickard to go west with the rest of the checks and wire him money as they went along (R. I, 104-105). The two cashed about $600 in checks in motor hotels in El Paso, Texas (R. I, 110-117) and from El Paso wired $500 to petitioner in Tulsa (R. I, 117, 149-150). Trusty and Pickard continued through New Mexico, Arizona, California and Nevada cashing the remainder of the checks (R. I, 117-119). After passing the last of them, they returned to Tulsa and split the proceeds with petitioner (R. I, 119-121). The checks passed by Trusty and Pickard were transmitted to the issuing bank in San Francisco through regular banking channels and paid (R. I, 62-68, 73-74).

2. During the course of the trial court's charge to the jury, the following instructions were given without objection (R. II, 291, 312):

> Now, a number of exhibits have been introduced in evidence during the trial of this case. You are to consider them as any other evidence in the case. You have a right to have the exhibits, or such of them as you care to consider, with you in the jury room during your deliberations, and if, *after you start your deliberations, you decide that you want to have the exhibits, or*

any of them, your foreman will send a note to that effect to the Court and the Court will see that such exhibits as you desire are sent to you. [Emphasis supplied.]

* * * *

THE COURT: All right, ladies and gentlemen of the jury, the Clerk will hand to one of your number the verdict form and the indictment, and you may commence your deliberations. *Should you decide that you want to go out to lunch, you can notify the officer in charge.* If you do leave, you will remember that you are not to discuss the case outside the jury room and you will not permit anyone to discuss it in your presence or near you. You are not to read any newspaper articles or listen to television or radio discussion of it. [Emphasis supplied.]

In his motion for a new trial, petitioner suggested for the first time that it was error for the court to permit the jury to recess for lunch, reconvene after lunch, and have the trial exhibits delivered to them, without petitioner or his counsel being present (R. II, 329). Counsel stated that the jury retired about 11:30; that about 12:30 the Clerk advised him that the court had sent them to lunch, and that at 1 o'clock he was told that the jury had reconvened; and that later he saw the bailiff carrying exhibits (R. II, 321-323). The court stated (R. II, 323):

THE COURT: I think the record will show that the jury never did come back into the courtroom, and in open court discharged for lunch or anything like that.

MR. DICKEY: Is it true that they did request the exhibits and the exhibits were sent to them?

THE COURT: The Court can't recall. We will have to rely on the record.

ARGUMENT

The sole issue presented[2] is whether the conviction should be reversed because the jury recessed its deliberations for lunch and reconvened while petitioner was not present, and because the trial court "apparently" permitted the trial exhibits to be delivered to the jury out of his presence (Pet. 2-3). There is no merit to petitioner's complaint. The record, as supplemented by petitioner's counsel at sentencing (R. II, 321-323), shows that the jury was never brought back into the courtroom in petitioner's absence. The jury was informally sent to lunch, reconvened, and given trial exhibits, all in compliance

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[2] We read the petition as raising only the single issue of improper handling of the jury. Petitioner apparently argues that the importance of this question is enhanced by the presence in the case of a question of venue, denial of his motion for a bill of particulars, and refusal to give him a list of prosecution witnesses (Pet. 4). These additional factors are completely unrelated to the jury question. If they are considered as independently asserted, we submit (1) that the Statement, *supra*, clearly shows that venue was proper in the Western District of Texas (see 18 U.S.C. 3237); (2) that the detailed indictment (R. I, 1-8) informed petitioner of the charges against him with sufficient clarity to enable him to prepare his defense, and to protect him from double jeopardy; and (3) that petitioner's motion for a list of witnesses was properly denied since such a list is required only in a capital case (18 U.S.C. 3432) and no showing of any special necessity was made here.

with the court's instructions which had been given in the presence of petitioner and his counsel and to which no objection had been made at the time. Under the informal procedure set forth in the court's instructions, no "stage of the trial" requiring petitioner's presence occurred. In any event, as the court of appeals noted, petitioner's own version of events fails to show any possibility of prejudice or detriment to his opportunity to defend that would require reversal (R. II, 357-358). See *Walker* v. *United States*, 322 F. 2d 434 (C.A.D.C.), certiorari denied, 375 U.S. 976; *Stein* v. *United States*, 313 F. 2d 518, 522 (C.A. 9), certiorari denied, 373 U.S. 918.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
PAUL C. SUMMITT,
Attorneys.

SEPTEMBER 1965.

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